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8 UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

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11 JOSHUA N. DELEON,

12 Petitioner,

13 v.

14 JEFFREY A. UTTECHT,

15 Respondent.

CASE NO. 19-5424 RJB-JRC

ORDER ON REPORT AND  
RECOMMENDATION

16 THIS MATTER comes before the Court on the Report and Recommendation of U.S.  
17 Magistrate Judge J. Richard Creatura. Dkt. 14. The Court has considered the Report and  
18 Recommendation, objections, and the remaining file.

19 In this 28 U.S.C. § 2254 habeas corpus petition, the Petitioner challenges a state court  
20 conviction, by guilty plea, of rape of a child in the first degree, child molestation in the first  
21 degree and second degree, and the resulting May 11, 2018 sentence. Dkt. 1. His direct appeal is  
22 pending in the Washington Court of Appeals Div. II. *Washington v. DeLeon*, Washington Court  
23 of Appeals Div. II case number 51934-8-II. On September 12, 2019, the Report and  
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1 Recommendation was filed, recommending that this petition be denied without prejudice for  
2 failing to exhaust state court remedies on any of the claims. Dkt. 14.

3 “State prisoners seeking a writ of habeas corpus from a federal court must first exhaust  
4 their remedies in state court. A petitioner has exhausted his federal claims when he has fully and  
5 fairly presented them to the state courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir.  
6 2014)(citing 28 U.S.C. § 2254(b)(1)(A) and *O’Sullivan v. Boerckel*, 526 U.S. 838, 844–45, 119  
7 S.Ct. 1728 (1999)).

8 The Report and Recommendation (Dkt. 14) should be adopted. The Petitioner has not  
9 fully presented any of his claims to the state courts. His first direct appeal is pending. The  
10 Petitioner has failed to exhaust his state court remedies as required by 28 U.S.C. §  
11 2254(b)(1)(A). This federal habeas action is premature.

12 Under *Rhines v. Weber*, 544 U.S. 269, 276 (2005), a district court has discretion to stay a  
13 petition with both exhausted and unexhausted claims to allow the petitioner time to present his  
14 unexhausted claims to state courts. In the Ninth Circuit, a “district court has the discretion to  
15 stay and hold in abeyance fully unexhausted petitions under the circumstances set forth in  
16 *Rhines*.” *Mena v. Long*, 813 F.3d 907, 912 (9th Cir. 2016). A stay and abeyance under *Rhines* is  
17 available when: (1) “the petitioner had good cause for his failure to exhaust,” (2) the petitioner’s  
18 “unexhausted claims are potentially meritorious,” and (3) “there is no indication that the  
19 petitioner engaged in intentionally dilatory litigation tactics.” *Rhines*, at 278.

20 Petitioner does not request a stay here. In his objections, the Petitioner maintains that the  
21 state courts do not have jurisdiction to decide his claims. Dkt. 15. The Petitioner fails to cite any  
22 authority that supports his position. His remaining assertions are without merit and do not  
23 provide a basis to reject the Report and Recommendation. Further, there is no showing that a  
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1 stay, rather than dismissal, is appropriate. There is no showing that the petitioner had good cause  
2 for his failure to exhaust. *Rhines*, at 278. This case was filed on May 13, 2019 - a year after the  
3 Petitioner was sentenced. Further, it is unclear whether the “unexhausted claims are potentially  
4 meritorious.” *Rhines*, at 278. While “there is no indication that the petitioner engaged in  
5 intentionally dilatory litigation tactics” *Rhines*, at 278, there are no other grounds to stay the case  
6 and hold it in abeyance rather than dismissing it without prejudice.

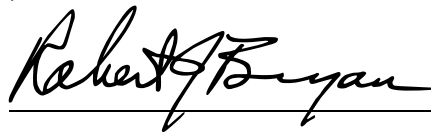
7 Further, a certificate of appealability should not issue. As stated in the Report and  
8 Recommendation, reasonable jurists could not debate whether, or agree that, the petition should  
9 have been resolved in a different manner; the issues raised are not adequate to deserve  
10 encouragement to proceed further; and jurists of reason would not find it debatable whether the  
11 court was correct in its rulings. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). A Certificate of  
12 Appealability should be denied.

13 It is **ORDERED** that:

- 14 • The Report and Recommendation (Dkt. 14) **IS ADOPTED**;
- 15 • This case **IS DISMISSED WITHOUT PREJUDICE**; and
- 16 • The certificate of appealability **IS DENIED**.

17 The Clerk is directed to send uncertified copies of this Order to Judge Creatura, all  
18 counsel of record, and to any party appearing *pro se* at said party’s last known address.

19 Dated this 21<sup>st</sup> day of October, 2019.

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21 ROBERT J. BRYAN  
22 United States District Judge  
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